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JUN 16 2000

June 16, 2000

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submits this original and three copies of a letter disclosing an oral and written ex parte presentation in the above-captioned proceedings. On June 15, 2000, the following representatives of the Real Access Alliance met with members of the staff of the Wireless Telecommunications Bureau and the Cable Services Bureau:

Megan Booth	National Association of Realtors and Institute of Real Estate Management
Barry Krell	CarrAmerica Realty
Tony Edwards	National Association of Real Estate Investment Trusts
Gerard Lavery Lederer	Building Owners and Managers Association, International
Nicholas P. Miller	Miller & Van Eaton, P.L.L.C.
Matthew C. Ames	Miller & Van Eaton, P.L.L.C.

Wireless Bureau staff present at the meeting were: Jeffrey Steinberg; Lauren Van Wazer; Leon Jackler; and Pieter van Leeuwen. Cable Bureau staff present were: William Johnson; John Norton; Royce Dickens; and Eloise Gore. The participants discussed the matters discussed in the attached written ex parte materials.

Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, ~~P.L.~~L.C.

By Matthew C. Ames

cc: Ms. Megan Booth (by mail)
Royce Dickens, Esq.
Tony Edwards, Esq. (by mail)
Eloise Gore, Esq.
Leon Jackler, Esq.
William Johnson, Esq.
Mr. Barry Krell (by mail)
Gerry Lederer, Esq. (by mail)
John Norton, Esq.
Jeffrey Steinberg, Esq.
Pieter van Leeuwen
Lauren Van Wazer, Esq.

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COMMISSION REGULATION OF BUILDING ACCESS WOULD NEEDLESSLY INTERFERE WITH MARKET FORCES AND WOULD NOT ADVANCE THE COMMISSION'S GOALS

- **Building Owners, Under the Influence of Market Forces, Are Furthering Commission Policy.**

  - Building owners are increasingly acting to take control of inside wiring out of the hands of the ILECs, which was one of the goals of the Commission's 1990 inside wiring order and previous decisions. *See Review of Section 68.104 and 68.213 of the Commission's Rules,* Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 88-57, 5 FCC Rcd 4686, ¶ 6 (1990); *Detariffing the Installation and Maintenance of Inside Wiring*, Second Report and Order, Docket No. 79-105, 59 R.R. 2d 1143, *recon. granted in part,* 1 FCC Rcd 1190 (1986). Competition is accelerating this process.

  - Building owners further FCC policy in various ways: by installing their own wiring, by moving the demarcation point to the minimum point of entry, by granting access to CLECs, and by entering into agreements with "building centric" providers.

  - All of these strategies represent business decisions by building owners that ultimately reduce the legacy power of the ILECs. The Commission should not force a single model on building owners, because different strategies may be required in different situations, and the market is better suited than regulation to rewarding owners who pick the right strategy.

- **The Extension of FCC Regulation to Private Property Owners is a Legal and Policy Morass that Will Not Improve Current Market Conditions.**

  - Commission regulation would raise serious constitutional issues.

  - Commission regulation would implicate state property law.

  - The Commission has no jurisdiction or authority to regulate building access.

  - Commission action would involve extending regulation to an unregulated sector of the economy without justification.

  - Imposing common carrier requirements on non-carrier property owners is totally unprecedented.

- **There Is Wide Variation in the Terms of Access to Buildings, which Renders Consistent Regulation Impractical.**

  - ➢ Owners typically are unable to describe the scope of ILEC access rights in buildings built before 1990 without examining the specific facts and circumstances of each case in light of state law. In some cases, easements were granted and recorded or license agreements signed, but in most older buildings no written documentation exists. In general, owners believe that ILECs have only licenses under state law.

  - ➢ In a recent survey regarding new construction (defined as buildings constructed in the last three years) (the "NAIOP/NMHC Survey," attached as Tab A), the Real Access Alliance found that in a substantial number of instances building owners negotiate license agreements with ILECs.

    - 52.2% of owners report that they negotiate licenses, grant easements or require no written documentation of the terms of access, depending on circumstances.
    - 4.3% report that they always require ILECs to sign license agreements.
    - 6.5% report that they only grant easements to ILECs.
    - 37.0% report that they never require any written documentation of access terms.

  - ➢ 20.0% of respondents reported that they believe that the ILEC has specific rights related to building access under state law.

- **Building Owners Do not Discriminate Between ILECs and CLECs: They Negotiate for the Best Terms with each Provider in each Building.**

  - ➢ In the NAIOP/NMHC Survey, 51.1% of owners report having a license agreement with an ILEC in at least one building, and 15.6% report that the ILEC pays for access rights in at least one building. This is very different from the situation five or ten years ago.

  - ➢ 58.3% provide CLECs with additional services, such as assistance in marketing to tenants, under the terms of their license agreements. In contrast, 84.6% report that they do not provide such services to ILECs unless the ILEC has signed a license agreement. Consequently, CLECs obtain value from owners that ILECs do not.

  - ➢ A recent survey conducted by the Building Owners and Managers Association (the "BOMA Survey")[1] shows that reliability and quality of service are the primary factors both building owners and tenants consider in choosing a provider.

[1] The BOMA Survey is in the process of being printed. We will submit copies separately as soon as they are available.

ILECs have an advantage over CLECs because their quality and reliability are known quantities.

- **The Evidence that Owners Grant Access to CLECs on Reasonable Terms Is Overwhelming.**

  - Every one of CarrAmerica's buildings in the District of Columbia is served by at least two CLECs plus the ILEC. See Declaration of Barry M. Krell attached as Tab B.

  - 90% of CarrAmerica's DC buildings are served by at least 4 CLECs, and 40% are served by at least 8 CLECs.

  - WinStar and Teligent have been granted access to 100% of CarrAmerica's DC buildings.

  - According to the BOMA Survey, only 42% of owners and managers had buildings served by a competitive provider prior to 1997. Today, 80% of buildings are served by at least one competitor in addition to the ILEC, and 60% are served by at least two competitors in addition to the ILEC. [Note that the BOMA Survey did not distinguish between providers of local telephone service, high speed Internet access and bundled services.]

  - 15% of BOMA Survey respondents report at least one instance in which a service provider has refused to agree to serve a building.

- **Owners Must Be Free To Choose the Best Providers To Serve a Building.**

  - As noted earlier, the key concern of both owners and tenants in selecting a service provider is reliability and quality of service. Creating a right of access that favors existing companies regardless of their ability to perform will stifle competition and innovation.

  - Building owners are meeting tenant demand: 98% of tenants in the BOMA Survey stated that when they have asked building management for service from a particular telecommunications provider, they have received it.

  - Some providers are unable to meet their commitments to begin service in buildings: In 24 out of 65 contracts – about 37% – signed by Carr America for its DC buildings since 1996, the CLEC has not yet begun service.

  - Once a contract is signed, the owner must reserve space in the building for that provider, possibly precluding entry by another provider who might offer better service or newer technology.

- The new "building centric" providers, or "B-LECs" arose in response to the inability of existing CLECs to provide timely, responsive service in buildings.

- **The BOMA Survey Contains Additional Relevant Information.**

  - 90% of agreements in office buildings are non-exclusive.

  - The average term of a building access agreement is five years. This represents a substantial commitment by building owners, who typically grant building management firms contracts with durations of only six months.

  - 32% of owners and managers use a third-party firm to help with negotiations.

  - Typical negotiation time for an access agreement is 3-6 months; 73% are completed in six months or less.

  - 54% of owners and managers report that the demarcation point is at the minimum point of entry.

  - A large variety of telecommunications service providers – not just CLECs – pay rent to building owners for the right to install facilities in a building. These include broadcasters, high speed Internet service providers, cellular and PCS operators, and cable operators, among others. Only 43% of CLECs pay rent, compared to 64% of broadcasters and 21% of cable operators.

  - The most common form of rental arrangement is a flat fee (81%). About 10% of the time, providers pay a share of their revenues, and 9% of the time they pay a combination of a flat fee and a revenue share. Revenue sharing is becoming more common.

  - In the BOMA Survey, 50% of owners reported that they own the wiring in buildings, and that the ILEC owns the wiring only 19% of the time. In the NAIOP/NMHC Survey, on the other hand, 55.8% of owners reported that the ILEC owns the facilities. This may reflect the participation of residential property owners in the NAIOP/NMHC Survey; it may also reflect uncertainty about the effects of state fixtures laws.

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THE REAL ACCESS ALLIANCE SUPPORTS IMPROVED REGULATION OF CARRIERS THAT WILL PROMOTE COMPETITION BY REASONABLE AND EFFECTIVE MEANS

- The Commission can and should move the demarcation point in all buildings to the minimum point of entry.

- The Commission can and should clarify the existing telephone inside wiring rules to establish a mechanism by which a building owner can purchase wiring that is located on the building owner's side of the demarcation point and is owned by an incumbent carrier.

- Using the Commission's jurisdiction over carriers, the Commission can and should:

  - Limit the power of ILEC incumbency by limiting the maximum length of access agreements.

  - Void ILEC terms of access except where covered by an existing contract, and to the extent consistent with state law.

  - Prohibit exclusive contracts in office buildings.

  - Rely on Unbundled Network Element principles to give CLECs access to remaining ILEC wiring.

- The Commission cannot and must not interfere with the authority of building owners to decide which providers will be granted access to a building.

- The Commission should not take any action that might weaken or undercut its existing cable inside wiring rules.

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Results of Building Access Questionnaire

1. **When you construct a new building, do you contact the incumbent local exchange carrier ("ILEC") (typically the local Bell company or GTE) regarding telephone service to the building, or does the ILEC approach you?**

   - 87.2 % of respondents contact the ILEC.

2. **When you grant ILECs access to new buildings:**

   - **Do you negotiate license agreements?**
   - **Do you grant easements?**
   - **Does the ILEC come in without any written documentation of the terms of the ILEC's access?**

   - 34.8% of respondents have negotiated license agreements in most cases.
   - 56.5% of respondents have granted easements in some cases.
   - 69.6% of respondents have ILECs in some of their buildings without written documentation of the terms of access.

   A more detailed analysis of the response shows that:
   - 37% of respondents do not require any written documentation of the terms of access in any of their buildings.
   - 4.3% of respondents always require the ILEC to sign a license agreement.
   - 6.5% of respondents grant only easements to the ILEC.
   - 19.6% of respondents may grant licenses or easements, depending on the circumstances.
   - 8.7% of respondents grant licenses, easements, or require no written documentation, depending on the circumstances.
   - 2.2% of respondents either grant licenses or require no written documentation.
   - 21.7% of respondents either grant easements or require no written documentation.

3. **In those cases in which you have a written agreement with an ILEC to serve a new building, what are the typical terms?**

   - **Does the ILEC agree to pay compensation for the right of access?**
   - **Do the terms differ significantly from the terms of your agreements with competitive local exchange carriers (CLECs)?**

   - 51.1% of respondents have written agreements with the ILEC.
   - 15.6% of respondents require the ILEC to pay compensation.
   - 72% of respondents have agreement terms with ILECs that vary significantly from their agreement terms with CLECs.

4. **If you have granted an ILEC access to a new building without a written agreement during the last three years, why did you not require one?**

   - 34.8% of respondents have negotiated license agreements in the last three years.

In those cases that they did not, they cite the following reasons:

- 25.8% of respondents could not get the ILEC to sign a written agreement.
- 19.4% of respondents didn't know they could require a written agreement from the ILEC.
- 16.1% of respondents had no viable competition from a CLEC.
- 35.5% of respondents either have never required ILECs to sign written agreements in the past, or did not think it was necessary to have a written agreement.
- 12.9% of respondents cited other reasons.

5. **If you do not sign a written agreement with an ILEC to serve a new building, what is your understanding of the ILEC's rights?**

   - **Does the ILEC own the wiring and other facilities in the building?**
   - **Can you require the ILEC to remove its facilities?**
   - **Can you control the activities of the ILEC's personnel in the building?**
   - **Are you aware of any state laws, regulations or court decisions that grant the ILEC specific rights?**

   - 55.8% of respondents stated that the ILEC owns the wiring and facilities.
   - 55.0% of respondents stated that they can require the ILEC to remove its facilities.
   - 82.5% of respondents stated that they can control the ILEC's personnel activities in the building.
   - 20.0% of respondents are aware of specific ILEC rights under state law.

6. **If the ILEC has no written agreement, do you provide any specific services or benefits to the ILEC, such as assistance in marketing to tenants?**

   - 15.4% of respondents will assist ILECs in marketing to tenants without a written agreement between the ILEC and the building owner.

7. **If a CLEC signs a license agreement to serve one of your buildings, do you provide any services or benefits that you do not provide to the ILEC, such as marketing assistance?**

   - 58.3% of respondents will provide services or benefits to CLECs that are not provided to ILECs, if the CLEC signs a license agreement.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Promotion of Competitive Networks in Local Telecommunications Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	WT Docket No. 99-217 CC Docket No. 96-98

DECLARATION OF BARRY M. KRELL

I, Barry M. Krell, declare as follows:

1. I am Vice President - Telecommunications of CarrAmerica Realty Corporation ("Carr America") and I have worked in the property management industry since 1970. I have been negotiating building access contracts with competitive local exchange carriers ("CLECs") in the District of Columbia since 1997. I am fully competent to testify to the facts set forth herein, and if called as a witness, would testify to them.

2. CarrAmerica and its affiliates own and manage a total of approximately 30 million square feet of office space nationwide. In the District of Columbia, CarrAmerica owns a total of 10 office buildings, with 2.3 million square feet (the "DC Buildings").

3. We have granted access to competitive providers in every one of our DC Buildings, in addition to the ILEC. In our DC Buildings:

- 10% have 2-3 competitive providers;
- 30% have 4-5 competitive providers;
- 20% have 6-7 competitive providers; and
- 40% have 8-10 competitive providers.

4. In our DC Buildings, CarrAmerica has granted access to an average of 6.5 competitive providers per building. Winstar and Teligent have both been granted access to 100% of the DC Buildings. Other CLECs that have been granted access include: Broadband Office; E.spire; Kivex; Level 3; MCI-Metro; MetroMedia; Nextlink; Starpower; and TCG (AT&T Local).

5. Since April 1996, CarrAmerica has signed 65 contracts granting access to the 10 DC Buildings. To date, CLECs have failed to provide service to our tenants under 24 of these contracts. In other words, CLECs have failed to honor their building access contracts approximately 37% of the time. Many of these contracts were signed years ago.

6. The problem of non-service from CLECs with building access contracts has become so acute in the District of Columbia that CarrAmerica has declined to enter into new contracts with certain CLECs until those CLECs honor their commitments to provide service in buildings in which they have already signed a building access contract. Several companies have either not

begun providing service to any tenants despite having had agreements for two years or more, or are serving tenants in only a small proportion of the buildings to which they have been granted access. Carr America is unwilling to sign new contracts with these providers – even though the CLECs in question are willing to pay for the right to be in the building – for three reasons. First, once we sign a contract we have to reserve space in the building for the provider's equipment even if they are not ready to come in, which limits our ability to bring in additional providers who may be able to introduce service faster. Second, riser space is at a premium and it also must be reserved once we sign a contract. Expanding riser capacity is a very expensive proposition, especially in older buildings, because it can require significant engineering and construction work. Finally, it is bad for our relations with tenants to announce that a provider will be coming in, only to find that tenants will not be able to get service from that provider.

7. Based on our experience, granting CLECs the right to come into buildings on regulated terms would not advance the FCC's goals. CarrAmerica has time and again granted access to CLECs only to find that the CLECs are unable to meet their obligations in a reasonable amount of time. Giving every provider the right to get into every building will not advance competition because many of the providers cannot or simply have not taken advantage of the building access rights they have already been provided by agreement. Imposing obligations on the real estate industry will not cause CLECs to provide service any sooner; it will only favor those CLECS that are already in the market, and force building owners to give up scarce space that will then be unavailable to other providers who might actually be able to provide service in a timely manner.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on June 14, 2000 in Washington, D.C.

Barry M. Krell

Barry M. Krell

COMPARISON OF REVENUES RECEIVED BY PROVIDERS FROM PROVIDING VIDEO SERVICE IN APARTMENT BUILDINGS AND TELECOMMUNICATIONS SERVICE IN OFFICE BUILDINGS

Annual revenue from providing video service in an average-sized apartment building:

- 30 units x $50 per month per unit ($600 per year) = **$18,000**

Annual revenue from providing video service in a median-sized apartment building:

- 150 units x $50 per month per unit ($600 per year) = **$90,000**

Annual revenue from providing telecommunications service in an average-sized office building:

- 20 tenants x $1000 per month per tenant ($12,000 per year) = **$240,000**

Annual revenue from providing telecommunications service in a median-sized office building:

- 30 tenants x $1000 per month per tenant ($12,000 per year) = **$360,000**

  Therefore, an average-sized office building can yield over 13 times as much revenue as an average-sized apartment building. When comparing a median-sized office building to a median-sized apartment building, the office building yields four times as much revenue.

Assumptions:

1. According to a recent BOMA survey, the average number of tenants in office buildings is 22. We have used 20 to simplify the arithmetic and provide a slightly more conservative figure. The median number of tenants in the buildings covered by the BOMA survey was between 20 and 40, so we have assumed that the median number of tenants in a building is 30.

2. The number of units in apartment buildings varies greatly, but according to Census Bureau data available on the National Multi Housing Council's Web site, there are about 15,029,100 apartment units in 518,820 apartment buildings with five or more rental units. This is an average of 29 units per building. In the first example, we have rounded to 30 units both to simplify the arithmetic and to provide a slightly more conservative figure. The second example, using 150 units, represents the roughly 46% of apartment buildings that have between 50 and 300 units. On that basis, we have assumed that the median number of units in an apartment building is 150.

3. According to the FCC's 1999 Annual Cable Television Competition Report, average cable revenue per subscriber is $44. We have rounded this figure to $50 for the same reasons as above.

4.	We do not have an accurate figure for the average amount paid by office building tenants for telecommunications services. For purposes of this comparison, we have used $1000 per month, which we believe is a conservative estimate. The estimate was calculated by dividing an estimate of total revenues received by telecommunications providers from business subscribers by an estimate of the number of office tenants in the country. The $1000 figure is only an approximation, but we think it provides a rough basis for comparison.

According to the Census Bureau's 1992 Economic Census, there are 5,829,983 business establishments in the country. Note that this figure is likely to be considerably higher than the number of office tenants because many businesses, especially smaller ones, will not rent space in office buildings. Therefore, to estimate the number of actual office tenants, we subtracted the number of business establishments that had no employees (411,549) or only 1 to 4 employees (2,330,762), which resulted in 3,087,671. We rounded that number to 3.1 million.

To determine total telecommunications revenues received from office tenants, we started with the Census Bureau's estimate of local, long distance and network access revenue for 1998. The Census Bureau reports $30.3 billion in nonresidential local service revenues, $60.0 billion in long-distance revenues, and $31.7 billion in network access revenues, for a total of $122 billion. We ignored long distance revenues, and assumed that all network access revenues were ultimately paid by telephone subscribers and received by local exchange carriers, so that nonresidential subscribers paid LECs approximately $62 billion for telecommunications services in 1998. We then reduced that figure by 30% to account for revenue from owner-occupants and other subscribers who do not rent space in office buildings. The resulting figure of $43 billion was then divided by 3.1 million office tenants for an average of $13,870 per year or $1156 per month, which we rounded down to $1000 to provide a conservative figure. If long distance revenues are included, using the same method yields an average of $2400 per month.

5.	Note that we have assumed 100% penetration rates for both types of service, which exaggerates total cable service revenues by about one-third, based on historical experience.

THE REAL ACCESS ALLIANCE SUPPORTS THE COMMISSION'S CABLE INSIDE WIRING RULES AND THE PROPOSALS IN THE FURTHER NOTICE OF PROPOSED RULEMAKING

➢ **Any federal regulation requiring MDU owners to grant access to telecommunications or video programming providers would eviscerate the FCC's cable inside wiring rules.**

- The fundamental purpose of the cable inside wiring rules is to limit the ability of incumbent cable operators to use their incumbency and market power to force MDU owners to sign unfavorable agreements. The rules strike a delicate balance between promoting competition in the delivery of video services in MDUs and protecting the rights of incumbent providers under the Constitution and state law. Consequently, the rules do not apply if a provider has "a legally enforceable right to remain" in a building. 47 C.F.R. § 76.804.

- Any federal rule that would allow a video programming provider to install its facilities in a building over the objections of the building owner would circumvent the inside wiring rule. Such a new right to install facilities would mean that the provider would have a legally enforceable right to remain in any building in which it already had facilities, because if the building owner sought to exercise its rights under §76.804, the provider could simply counter by exercising its rights under the new forced access rule.

- Even a rule that applied only to telecommunications providers would circumvent the cable inside wiring rules, because most multiple system operators are certificated CLECs. Even if they are not now offering telecommunications services, they intend to do so in the near term.

- Because of the economics of serving MDUs, as discussed below, adopting a forced access rule would not only undercut the current inside wiring rule, but it would not even advance the alleged goal of promoting access for multiple providers. The true effect of such a rule would be to strengthen the current monopoly position held by the ILECs and the incumbent franchised cable operators. The result would be a two-wire world, in which the vast majority of MDU residents would have the same two choices they have now.

➢ **Providers of competitive video programming services – unlike competitive local exchange carriers -- require exclusive contracts to serve MDUs because the economics of the video market differs greatly from that of the telecommunications market.**

- The debate over exclusive contracts arises entirely out of the economics of providing service in the two different markets. Exclusive contracts are very rare in the office market because they typically do not benefit tenants, providers, or building owners. On the other hand, exclusive contracts are more common in the residential video market because by creating alternatives to the incumbent they benefit tenants and building owners as well as the competitive providers.

- The total revenue for video programming services yielded by the typical MDU is only a fraction of the total telecommunications revenue produced by an office building. This is a function of the average revenue per subscriber and the total number of potential subscribers in a building. The attached example shows that on average the video service revenue potential of an MDU is only 7.5% of the telecommunications revenue potential of an office building. When one compares buildings of median size, MDU video revenues are still only one-quarter of office building telecommunications revenues.

- The average revenue obtained from an individual MDU resident for video services is only a fraction of the average revenue received for providing telecommunications services to an office tenant. Cable subscribers pay, on average, about $50 a month for service, while office telecommunications subscribers pay about $1000 a month for service.

- It is important to remember that not all MDU residents pay for video service, and many are still unlikely to do so even if there is a competitive option, while every office tenant must have telephone service.

- In addition, individual MDU residents will never be willing to pay nearly as much for telecommunications services as office tenants, which is one reason that CLECs – despite their protestations – have little interest in serving the residential market, even over the long term.

- Because total revenues from providing video service in an MDU are so much smaller than office telecommunications revenues, each competitor needs a larger share of the total to be profitable. CLEC's often can afford to share access in a building, because even a small share of the total revenue may be enough to make money. CLECs oppose exclusive contracts, because even a single tenant may justify the cost of installing facilities. Competitive video providers, on the other hand, require exclusive contracts because they typically cannot justify the cost of installing facilities if there is another provider in the building: no single tenant could possibly produce enough revenue to be profitable.

- Similarly, because each individual cable subscriber in an MDU pays so much less than an office telecommunications subscriber ($50 versus $1000), it is harder to justify the increased costs of serving many such subscribers without aggregating demand through an exclusive contract. A video service provider must spend a larger proportion of its total revenue from each subscriber on marketing, billing, customer service and administration than a CLEC does for each office tenant.

- In sum, CLECs and competitive video providers are serving two entirely different markets using very different business models. The Commission should not be misled by the superficial similarities.

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